No. 93-744

In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The "true doubt" rule at issue in these cases provides that when evidence submitted by a claimant and the party opposing an award of benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) or the Black Lung Benefits Act (BLBA) is

of "equal weight," the remaining doubt is to be resolved in favor of the claimant. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 144 n.12 (1987); see also J.A. 9 (describing rule as applied below under LHWCA in *Maher*); Pet. App. 19a n.3 (describing rule as applied below under BLBA in *Greenwich Collieries*). We show in our opening brief that the "true doubt" rule is a longstanding principle of adjudication under both the LHWCA and the BLBA; that the rule is supported by the statutory and regulatory scheme under both programs; that the rule is also consistent with evidentiary principles in a variety of settings; and that it presents no conflict with Section 7(c) of the APA, 5 U.S.C. 556(d).

1. Respondents Maher Terminals (Br. 10-18) and Greenwich Collieries (Br. 37-40, 47-49) assert that the rule as we describe it is not a longstanding one, and that we inaccurately describe its operation.

a. The officials charged with administering the LHWCA have recognized since at least 1943 that "doubtful questions incapable of scientific resolution are to be resolved in favor of the workman." *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 887 n.1 (2d Cir. 1944) (quoting administrative decision).[1] This is

[1] In arguing that petitioner's use of the "true doubt" rule is entitled to no deference, Maher (Br. 19-20) and its amici (National Ass'n of Waterfront Employers, *et al.* (NAWE) Br. 17) fail to recognize that Congress has provided that the Secretary of Labor "shall administer" the LHWCA, and has given him express authority "to make such rules and regulations * * * as may be necessary in the administration" of the Act. 33 U.S.C. 939(a); see 20 C.F.R. 701.202(a) (delegating that authority to petitioner). Thus, petitioner administers the LHWCA to the same extent that she administers the BLBA, see *Mullins Coal Co.*, 484 U.S. at 159, and in the same sense that the Secretary of Labor administers the Occupational Safety and Health Act, see *Martin* v. *OSHRC*, 499 U.S. 144 (1991). Petitioner's consistent, longstanding views are accordingly entitled to deference. Another part of the Department of Labor, the Benefits Review Board, is an adjudicatory body established by the 1972 amendments to the LHWCA to perform functions that district courts previously performed. See 33 U.S.C. 921(b); Gov't Br. 24. Although the Board is not a policymaking body, and thus is not entitled to deference on questions of statutory inter-pretation (see *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980)), petitioner and the Board agree on the proper scope and application of the "true doubt" rule. There is therefore no question that the rule represents the view of the Department and is entitled to deference. Compare *Martin* v. *OSHRC*, *supra*. Moreover, it is not necessary, as Maher contends (Br. 21), that the Director's views be set forth in a regulation. See *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 439 (1986) (deferring to agency "practice and belief" that was not "reduced to a specific regulation"); *Morrison-Knudsen Constr. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (longstanding agency practice under LHWCA is entitled to deference).

essentially the "true doubt" rule. It is one application of the more general principle, long recognized by courts, that "[d]oubts, *including the factual*, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir.) (emphasis added), cert. denied, 350 U.S. 836 (1955).[2] The "true doubt" rule described in our

[2] Maher's amici go so far as to suggest (NAWE Br. 7) that the "true doubt" rule came into use in the 1980s as a "remedial alternative" to this Court's decision in *U.S. Industries/Federal Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608 (1982). The Benefit Review Board's decision in *U.S. Industries* itself, however, shows that the rule was well-established at that time, and "does not require that the administrative law judge always find for claimant when there is a dispute or conflict in the testimony." *Riley* v. *U.S. Industries/Federal Sheet Metal, Inc.*,

opening brief has been one of the principles governing LHWCA adjudications for many years; and it is that principle, not some possible broader formulation, that is at issue here.[3] See Pet. I (Question Presented); J.A. 9.

Maher also misunderstands the "true doubt" rule's application. As the court below correctly recognized (J.A. 13 & n.2), the rule does not result in a misuse of the presumption in Section 20(a) of the LHWCA, 33 U.S.C. 920(a), "[t]hat the claim comes within the provisions of this chapter." That presumption, like the Section 20(d) presumption construed in *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), places an initial burden of production on an employer, but "falls out of the case" once the employer meets that burden. That is how the Administrative Law Judge (ALJ) used the presumption here. See J.A. 13, 29, 40-43. The presumption does not forbid use of the "true doubt" rule, because the presumption's "only office is to control the result where there is an entire lack of

9 Ben. Rev. Bd. Serv. (MB) 936, 939 (1979), rev'd on other grounds, 627 F.2d 455 (D.C. Cir. 1980), rev'd on other grounds, 455 U.S. 608 (1982).

[3] Some courts have stated generally that the statutory policy of resolving doubtful factual questions in favor of a claimant results in "a less stringent standard of persuasion" than the "preponderance-of-credible-evidence test." *Young & Co.* v. *Shea*, 397 F.2d 185, 188, on petition for rehearing, 404 F.2d 1059, 1061 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969); see also *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481-482 (5th Cir. 1986). We do not read those decisions as allowing claimants to prevail without having adduced substantial credible evidence in support of their claims, and we therefore do not read them as advocating a "true doubt" rule materially different from the Director's.

competent evidence." *Del Vecchio*, 296 U.S. at 286. In *Maher*, as in any "true doubt" case, there was competent evidence on each side, and the ALJ resolved the case "upon the whole body of proof pro and con," as *Del Vecchio* instructs.[4] *Id.* at 287; see

[4] Maher also unsuccessfully attempts to argue that use of the "true doubt" rule is inappropriate as a matter of policy. Thus, Maher asserts (Br. 43-45) that the rule cannot be justified as part of a "quid pro quo" under which the LHWCA is construed liberally in favor of claimants to ensure that they obtain a prompt and certain recovery, because the employer's side of the bargain—definite and lower limits on liability—is not present. This Court has concluded otherwise, see Gov't Br. 26, and we doubt that other maritime employers would share Maher's view that tort liability is preferable to the LHWCA's payment of only two-thirds an injured worker's wages, subject to a statutory cap, 33 U.S.C. 906(b), 908(a), and medical expenses; relief from strict liability for unseaworthiness, see 33 U.S.C. 905(b); *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946); and participation in an employee's third-party recoveries to reduce LHWCA liabilities, 33 U.S.C. 933.

Maher's amici also incorrectly imply (NAWE Br. 18 & n.15) that LHWCA injury and illness rates have declined in the past ten years, even though their own authority shows that the rates for some of the less hazardous covered employment (in water transportation services) have not declined, and remain more than 50% higher than the national average. Pacific Maritime Ass'n, Ann. Rep. 42 (1993); see also U.S. Dep't of Labor, Employment Standards Admin., *Longshore and Harbor Workers' Compensation Act, Annual Report on Administration of the Act During Fiscal Year 1992*, at 4 (1993) (recent decrease in *number* of injuries "may reflect general economic factors"). Moreover, statistics from the Department's Bureau of Labor Statistics (see Maher Br. 35; NAWE Br. 18 n.15) show that in 1992 an equal if not larger part of LHWCA-covered employment—shipbuilding and repair work, see 33 U.S.C. 902(3)—recently had the second-highest rate of injury and illness in the nation. See Bureau of Labor Statistics, U.S. Dep't

J.A. 43-55. Nor is Maher accurate in asserting (Br. 16) that the ALJ in its case never found the evidence in equipoise: the ALJ expressly found that the evidence was "equally probative and conflicting." J.A. 34; see also J.A. 50, 55.

Use of the "true doubt" rule does not undermine the ALJ's factfinding function, or subvert the substantial evidence standard of review. See Maher Br. 27-30, 37-42; Greenwich Br. 46-49. Under the "true doubt" rule, the claimant always bears the burden of adducing competent evidence that would, standing alone, support an award of benefits. The ALJ then weighs that evidence against the evidence introduced by the employer. The Benefits Review Board properly vacates awards that do not explain how the ALJ weighed the relevant conflicting evidence, precisely because "[t]he resolving doubts rule * * * should not become an easy device with which administrative law judges can abdicate their primary responsibility as hearing officers to weigh the evidence and make factual findings." *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981). Courts of appeals, in turn, review under a substantial evidence standard both those close cases in which the ALJ has

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of Labor, *Workplace Injuries and Illnesses 1992* (Dec. 15, 1993); cf. 29 C.F.R. Pts. 1917, 1918 (special health and safety standards applicable to maritime employment). Maher's assertion (Br. 43) that longshore workers no longer benefit from special rules historically fashioned to protect maritime workers is also suspect. See 33 U.S.C. 908(i), 915, 916; *Morewitz* v. *Andros Compania Maritima, S.A.*, 614 F.2d 379, 382 n.6 (4th Cir. 1980); *Wooten* v. *Skibs A/S Samuel Bakke*, 431 F.2d 821, 823 (4th Cir. 1969); *Capotorto* v. *Compania Sud Americana de Vapores Chilean Line*, 541 F.2d 985, 988 (2d Cir. 1976) (Oakes, J., dissenting).

determined that evidence is *not* in equipoise (see *Sprague* v. *Director, OWCP*, 688 F.2d 862, 868 n.12 (1st Cir. 1982)), and those in which the ALJ has determined that it is. See *Old Ben Coal Co.* v. *Battram*, 7 F.3d 1273, 1274-1276 (7th Cir. 1993); *F.H. McGraw & Co.*, 145 F.2d at 888. If the evidence is not close enough for the ALJ rationally to find it of "equal weight," a court will reverse the ALJ's decision. See *Peabody Coal Co.* v. *Director, OWCP*, 972 F.2d 880, 883 (7th Cir. 1992).[5] For the same reasons, there is no merit to Maher's argument (Br. 32-37) that the "true doubt" rule operates like an irrational presumption in violation of due process. See also *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993).

b. We showed in our opening brief (Gov't Br. 26-33) that the "true doubt" rule under the BLBA is authorized by statute and regulation. Respondent Greenwich Collieries does not seriously contest the Director's authority under the statute,[6] but instead

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[5] Maher also appears to argue (Br. 5-6) that the ALJ's decision in Maher's case was not supported by substantial evidence. We believe the evidence was sufficient to support the ALJ's decision. Factually similar cases have been upheld under state workers' compensation laws. See, *e.g.*, *City of Seymour* v. *Industrial Comm'n*, 131 N.W.2d 323 (Wis. 1964); *Dundee Woolen Mills* v. *Chism*, 219 S.W.2d 628 (Ark. 1949); *Mattfield* v. *Ward Baking Co.*, 221 N.Y.S.2d 224 (App. Div. 1961); 1 A. Larson, *The Law of Workmen's Compensation* § 12.21 (1993). In any event, that fact-bound issue does not warrant this Court's attention.

[6] Greenwich asserts that a report accompanying the 1972 BLBA amendments shows that Congress intended "that the burden [would] be placed on the claimant to prove the existence of pneumoconiosis" in cases where a statutory presumption did

argues (Br. 38) that 20 C.F.R. 718.3(c), if read literally, would apply the criminal law's "beyond a reasonable doubt" standard to BLBA cases. Section 718.3(c) requires only that the claimant be given the "benefit of all reasonable doubt," however, and in context it is best understood to encompass use of the "true doubt" rule. See Gov't Br. 29; see also Dep't of Labor, *Coal Mine (BLBA) Procedure Manual*, ch. 2-100, ¶ 3(b)(2) (Feb. 1980).

Greenwich also inaccurately describes (Br. 9-10, 39) the Department's comments accompanying the amendment of a different regulation governing death due to pneumoconiosis, 20 C.F.R. 718.205(d), in light of the 1981 amendments to the BLBA. The Department did not say (see Greenwich Br. 39) that claimants would carry the burden of proving necessary facts by the weight of the evidence. The commentary instead stated that a claimant has an initial burden, which then shifts to the coal mine operator, and that "the ultimate disposition of the claim is to be determined by the weight of the evidence." 48 Fed. Reg. 24,278 (1983). The commentary also tracks the understanding of the sponsors of the 1981 amendments, see 127 Cong. Rec. 31,747 (1981) (Rep. Perkins); *id.* at

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not apply. Greenwich Br. 42 (quoting S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972)). The quoted report does not specify, however, whether it refers to a burden of production or a burden of persuasion, and it adds the qualification that "judgment will be allowed to be exercised in determining the validity of claims in such cases." S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972). The report therefore does not stand for the proposition that claimants must bear the risk of non-persuasion in close cases, and it certainly does not show that the Secretary misused authority granted under later (1978) BLBA amendments. See Gov't Br. 28-29.

31,977 (Sen. Hatch), and thereby undermines any notion that the 1981 amendments disapproved use of the "true doubt" rule.[7]

Greenwich also argues (Br. 49) that the "true doubt" rule is unfair as a matter of policy, because coal companies have been singled out for treatment different from that accorded other litigants. But BLBA employers have not been singled out any more than the Veterans Administration, grant recipients, drug and pesticide manufacturers, or mine operators have been singled out under regulatory programs requiring those parties to bear the risk of non-persuasion. See Gov't Br. 21-22. Nor is there merit to the argument (Greenwich Br. 46-49; American Insurance Association (AIA) Br. 25; Nat'l Coal Ass'n (NCA) Br. 13-17) that the rule is applied arbitrarily and inconsistently. Greenwich does not dispute the current low approval rate of black lung claims, even with the "true doubt" rule (see Gov't Br. 33 n.19), and it recognizes that courts of appeals can correct improper applications of the rule. See Greenwich Br. 49 n.58 (citing *Peabody Coal, supra*).[8] And there is

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[7] Contrary to Greenwich's assertions (Br. 13-14 n.20, 40 n.41), the Director did rely on Section 718.3(c) in *International Anthracite Corp.* v. *Gilbert*, No. 92-3195 (3d Cir. May 14, 1993), and did contend prior to oral argument in that case that the "true doubt" rule placed the burden of persuasion on the party opposing benefits. See Br. of Fed. Resp. in *Gilbert* at 23-24, 32-34. In complaining (Br. 40 n.41) that the Director did not rely on Section 718.3(c) in *Peabody Coal Co.* v. *Director, OWCP*, 972 F.2d 880 (7th Cir. 1992), Greenwich fails to mention that *Peabody* was governed by the Department's interim presumption regulation, 20 C.F.R. 727.203, not by Section 718.3(c).

[8] As Greenwich notes (Br. 48 n.56), courts have sometimes stated that under the Department's permanent BLBA regulations the claimant has the burden of proving facts by a prepon-

nothing more inherently "subjective" or "arbitrary" about the "true doubt" rule than about the alternative: if ALJs were forced to decide evenly balanced cases in favor of the employer, that rule too could become a "convenient mechanism for ALJs to avoid making difficult decisions." AIA Br. 27. There needs to be some mechanism to break evidentiary deadlocks, and that is what any allocation of the burden of persuasion, including the "true doubt" rule, achieves.

2. As we explain in our opening brief (at 35), our submission regarding the interpretation of Section 7(c) of the APA, 5 U.S.C. 556(d), harmonizes the language of that Section and this Court's decisions. We show that the first sentence of Section 7(c), which allocates the "burden of proof," imposes only a burden of production, not the risk of non-persuasion. *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983). The third sentence of Section 7(c), which requires rules or orders to be supported by and in accord with reliable, probative and substantial evidence, does not allocate the risk of non-persuasion, but instead requires that evidence be evaluated under a preponderance-of-the-evidence standard of proof, rather than a higher (*e.g.*, clear-and-convincing)

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derance of the evidence. Some of the same courts, however, have also applied or approved use of the "true doubt" rule. See *Skukan* v. *Consolidation Coal Co.*, 993 F.2d 1228 (6th Cir. 1993), petition for cert. pending, No. 93-964; *Freeman United Coal Mining Co.* v. *OWCP*, 988 F.2d 706 (7th Cir. 1993), petition for cert. pending, No. 93-935; *Greer* v. *Director, OWCP*, 940 F.2d 88 (4th Cir. 1991). Read together, those cases show that courts require sufficient evidence from claimants to justify an award, but will allow a factfinder who examines the evidence, and adequately explains why he finds it equally balanced, to resolve remaining doubt in favor of the claimant.

standard. Gov't Br. 35-36; *Steadman* v. *SEC*, 450 U.S. 91, 98-102 (1981).

Respondent Greenwich Collieries essentially concedes (see Br. 27) that "burden of proof" means only "burden of production," but insists that the preponderance-of-the-evidence standard in the third sentence of Section 7(c) assigns the risk of non-persuasion to "[a]ny party that needs a fact to be found" and prohibits "an affirmative finding of fact on something less than the weight of the evidence." Greenwich Br. 24. Greenwich's argument is contrary to logic and the practice of courts and agencies.

There is nothing talismanic about seeking an "affirmative" finding of fact. For example, claimants under the LHWCA who establish an inability to perform their former jobs are entitled to benefits for total disability unless their employers prove, by a preponderance of the evidence, that suitable alternative employment is readily available.[9] See Gov't Br. 21 & n.11. The courts have recognized that the risk of non-persuasion does not have to turn on which party "needs" a fact to prevail, and whether a factual finding is expressed as an affirmative or negative proposition. See Gov't Br. 21-22, 41 and authorities cited;[10]

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[9] Respondent Maher Terminals (Br. 16) cites *Newport News Shipbldg. & Dry dock Co.* v. *Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979), for the proposition that an employer, in contesting total disability, may be seen as the proponent of a finding of less than total disability. That distinction is a matter of semantics; the employer could as easily have been described as the opponent of a finding of total disability. It does not change the fact that the claimant requires a finding of total disability in order to obtain the requested benefits.

[10] Greenwich's characterizations of some of the cases in which courts have concluded that Section 7(c) governs only the

McCormick on Evidence § 337 at 570 (E. Cleary 4th ed. 1992) (allocating burden of persuasion on whether averment is negative rather than affirmative "would place an entirely undue emphasis on what is ordinarily purely a matter of choice of forms," and allocating to "the party to whose case the element is essential * * * simply restates the question").

Moreover, if Greenwich's theory were correct, then the use of statutory and regulatory presumptions would violate the preponderance-of-the-evidence standard. Such presumptions allow findings of "affirmative fact" based on the failure of a party to produce sufficient evidence to rebut the presumption. See, *e.g.*, 30 U.S.C. 921(c) (Black Lung Benefits Act); 20 C.F.R. 727.203 (Department of Labor's black lung interim presumption); 33 U.S.C. 920(a); Greenwich Br. 7 (certain former BLBA presumptions "required employers to affirmatively disprove a claimant's entitlement" and "placed the burden of persuasion on the employer to prove the negative of one or more of

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burden of production are also semantic exercises. It says (Greenwich Br. 29 & n.32), for example, that in *Alameda County Training & Employment Bd.* v. *Donovan*, 743 F.2d 1267, 1269 (9th Cir. 1984), and *Maine* v. *United States Dep't of Labor*, 669 F.2d 827, 829 (1st Cir. 1982), the parties seeking to be relieved of a burden were claiming money from the government. The cases are more naturally described differently: The government sought to recover from the parties grant money that it alleged (presumably "affirmatively") had been misspent, but the courts allocated the burden of persuasion to the grantees. Similarly, in *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1003 (D.C.C. 1976), the government sought to suspend use of a registered pesticide, see Greenwich Br. 29, and to do so it "needed" a finding that an imminent hazard existed. Yet the court of appeals allocated the burden of persuasion to the company.

the facts essential for entitlement"). That also is not the law, in civil litigation or in agency adjudication. Instead, allocation of the risk of non-persuasion is a matter of policy and fairness based on experience in different situations. See Gov't Br. 19.

3. The American Insurance Association concedes (Br. 4-5) that *Transportation Management* does not allow Section 7(c) to be construed to assign the burden of persuasion, but asks the Court to overrule *Transportation Management* on this point. According to AIA, *Transportation Management* construed Section 7(c) contrary to the common understanding of "burden of proof" and to the context and legislative history of Section 7(c)'s enactment. AIA Br. 4-19. Aside from the fact that that argument was not made or passed on below and is raised in this Court only by an amicus (see, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979)), it is not persuasive. AIA has not established any adequate justification for departing from the fundamental principle of stare decisis on an issue of statutory construction. See *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171-175 (1989). Moreover, as we demonstrate in our opening brief (at 37-40), the language and context of Section 7(c) support the holding in *Transportation Management*.

Contrary to AIA's argument, courts and Congress have not commonly understood that "burden of proof" necessarily means "burden of persuasion." For example, as the court of appeals recognized (Pet. App. 9a), the "burden of proof" imposed by Section 301(a) of the Federal Power Act, 16 U.S.C. 825(a), was construed to mean "burden of going forward with the evidence" only three years before Section 7(c) was enacted. *Northwestern Elec. Co.* v. *Federal Power*

Comm'n, 134 F.2d 740, 743 (9th Cir. 1943), aff'd, 321 U.S. 119 (1944). This Court and other courts have also construed "burden of proof" in particular circumstances to mean only the burden of going forward or burden of production. See, *e.g.*, *Ward's Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 660 (1989); *Heiner* v. *Donnan*, 285 U.S. 312, 329 (1932); *Hawes* v. *Georgia*, 258 U.S. 1 (1922); *Garmeada Coal Co.* v. *Mabe*, S.W.2d 829, 830 (Ky. 1949); *McKemie* v. *McKemie*, 45 S.E. 2d 456, 458 (Ga. Ct. App. 1947).[11] Congress's use of the phrase "burden of proof" in Section 7(c) therefore does not foreclose inquiry into whether it intended that phrase to mean "burden of persuasion," "burden of production," or both. See also Gov't Br. 31.

Section 7(c)'s larger statutory context also shows that *Transportation Management*'s holding was

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[11] In *Radio Corp. of America* v. *Radio Eng'g Laboratories, Inc.*, 293 U.S. 1, 7-8 (1934), cited by AIA (Br. 9), this Court adopted a different interpretation, but recognized that courts had not defined the standard in terms of scientific accuracy or literal precision. Similarly, AIA (Br. 10) mistakenly relies on *Kerner* v. *Flemming*, 283 F.2d 916, 921 n.8 (2d Cir. 1960), for the proposition that Congress spoke clearly in using the phrase "burden of proof" as the way to assign the burden of persuasion under certain tax statutes. In fact, *Kerner* views those statutes as examples of Congress's assigning "*a* burden of proof," and does not say whether that burden was one of production or persuasion. *Ibid.* (emphasis added). AIA also mistakenly cites (Br. 14-15) *Kerner* as authority for construing Section 7(c) to impose a burden of persuasion. In fact, the court merely assumed that Section 7(c) could be construed that way and effectively held the opposite. See *Kerner*, 283 F.2d at 922 (remanding for the Secretary, not the claimant, to show Social Security claimant's inability to do suitable alternative employment); 3 K. Davis, *Administrative Law Treatise* § 16.9 at 260-261 (2d ed. 1980) (explaining *Kerner* in this manner).

correct. AIA urges (Br. 11) that Section 7(c) be construed to require what AIA describes as the traditional rule that a party seeking to change the status quo bears the burden of persuasion. As we show in our opening brief (Gov't Br. 19, 39), however, allocation of the risk of non-persuasion should not invariably turn on what happens to be the "status quo" when one party requests (or an agency itself proposes) agency action. AIA's rule would also make administrative proceedings more rigid than court proceedings, a result Congress could not have intended. See Gov't Br. 42-43; AIA Br. 12 n.9 (admitting that in civil litigation its rule has exceptions).

Section 7(c)'s legislative history also supports *Transportation Management*. As AIA recognizes (Br. 18-19), the committee reports accompanying the bills that the House and Senate passed both speak to the burden of production, and not the burden of persuasion, in describing the "burden of proof" under Section 7(c). See also *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1014-1015 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977). Those reports are the best evidence of congressional intent and support *Transportation Management*, which relied on *Environmental Defense Fund*. See Gov't Br. 38-40.

In attempting to minimize the import of that legislative history, AIA merely repeats an argument (AIA Br. 15-16) that *Environmental Defense Fund* properly rejected: that when legislators changed an earlier bill, which provided that the proponent of a rule or order had the "burden of proceeding," to the enacted language of Section 7(c), which provides that the proponent has the "burden of proof," they intended to change the relevant burden from one of producing

evidence to one of both producing evidence *and* bearing the risk of non-persuasion. The Senate Committee Print that explained changes in the earlier bill did not, however, address the reasons for the change in question. See S. Doc. No. 248, 79th Cong., 2d Sess. (*Legislative History of the Administrative Procedure Act)* 11, 30-31, 158 (1946). Interpretation of Section 7(c) should not rest on such a "mute intermediate legislative maneuve[r]."[12] *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947); see also *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979); *Environmental Defense Fund*, 548 F.2d at 1015.

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[12] AIA argues (Br. 16) that the Committee Print indicates an intended change in meaning by stating that "[t]he provision relating to the burden of proof is the standard rule." S. Doc. No. 248, *supra*, at 31. The undefined "standard rule" is more likely, however, to be the rule that litigants must support their cases with substantial probative evidence, rather than a rule governing allocation of risk of non-persuasion. See *Attorney General's Manual on the Administrative Procedure Act* 75 (1947) (quoting the Committee Print explanation and stating that "[t]here is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden of going forward' "); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946) ("no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper. * * * [E]very proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor"). AIA also mistakenly asserts (Br. 13-15) that decisions prior to *Environmental Defense Fund* construed Section 7(c) to allocate the risk of non-persuasion. To the contrary, the only case prior to *Environmental Defense Fund* that addressed the issue construes Section 7(c) to govern only the burden of production. See *Old Ben Coal Corp.* v. *Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 39-40 (7th Cir. 1975).

4. In our opening brief we show (Gov't Br. 43-47) that Section 7(c)'s "burden of proof" requirement applies only "[e]xcept as otherwise provided by statute," 5 U.S.C. 556(d), and that even if "burden of proof" in Section 7(c) meant "burden of persuasion," adjudications under the BLBA and LHWCA would be excepted from that requirement. We also show (Gov't Br. 45 & n.27) that statutes could "otherwise provid[e]" within the meaning of Section 7(c), and thereby supersede its "burden of proof" requirement, without doing so "expressly" pursuant to Section 12 of the APA, 5 U.S.C. 559. Respondents and their amici attempt to avoid the specific exception that Section 7(c) recognizes by insisting that Section 12 governs. See Greenwich Br. 37-43; Maher Br. 42; AIA Br. 19-25; NAWE Br. 27-28. But that construction eliminates Section 7(c)'s own "express" exception.[13]

Greenwich also argues (Br. 20, 33-42) that the BLBA and LHWCA do not otherwise provide for the burden of persuasion. With respect to the BLBA, Greenwich recognizes (Br. 36) that under 30 U.S.C. 956 the APA does *not* apply "[e]xcept as otherwise provided in this chapter." Greenwich nevertheless tries to show that Section 7(c) of the APA applies because (1) it is incorporated through a series of

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[13] Greenwich Collieries also mistakenly asserts (Br. 20) that until this litigation there was no serious dispute that the APA's hearing provisions are fully applicable to the BLBA and LHWCA. That assertion overlooks the en banc Fourth Circuit's holding that the BLBA superseded APA evidentiary requirements. See *Stapleton* v. *Westmoreland Coal Co.*, 785 F.2d 424, 434 n.8 (Hall, J.); *id.* at 465 (Widener, J. concurring and dissenting) (4th Cir. 1986), rev'd on other grounds *sub nom. Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135 (1987). See also 86-327 (*Mullins Coal*) Br. for Fed. Resp. 34 n.30.

cross-references that the Secretary has no power to override by regulation, and (2) if the Secretary had power, he did not exercise it.[14] Greenwich Br. 36-42. Greenwich's first argument fails because it misreads one of the incorporated provisions. The APA applies to the BLBA through incorporation of Section 19(d) of the LHWCA, 33 U.S.C. 919(d), which in turn provides that Section 5 of the APA, 5 U.S.C. 554, applies to LHWCA adjudications "[n]otwithstanding any other provisions *of this [Act]*" (emphasis added). See Gov't Br. 43. Because the referenced statute is the LHWCA, not the BLBA, Greenwich errs in construing 33 U.S.C. 919(d) to require the APA to apply notwithstanding contrary provisions in the *BLBA*. Greenwich's second argument also fails because, as discussed above and in our opening brief (at 29-30, 44), the Secretary's regulations do embody the principle of the "true doubt" rule. 20 C.F.R. 718.3(c).

Respondents also err in arguing (Greenwich Br. 33-35) that the LHWCA provides no exception to the "burden of proof" requirement in Section 7(c) of the APA. The principle that doubts are to be resolved in favor of the claimant was already established as a rule of construction under the LHWCA when the APA was enacted, and there is no indication that Congress intended the APA to revise the LHWCA in that

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[14] Greenwich also erroneously argues (Br. 36) that although the APA generally does not apply to the BLBA and Mine Safety and Health Act, Congress expressly identified specific sections of those statutes that would supersede specific provisions of the APA. The cited Mine Act provisions are generally silent, however, except when they specify that certain provisions of the APA will not apply to provisions *outside* the Mine Act. See 30 U.S.C. 812, 823(b)(2) (advisory committees and ALJs).

respect. See Gov't Br. 46. Moreover, Section 23(a) of the LHWCA, 33 U.S.C. 923(a), provides that administrative adjudicators generally "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure." Allocation of the burdens of production and persuasion have been identified as rules of evidence. See AIA Br. 9 (citing 9A *Uniform Laws Annotated*, Uniform Rule of Evidence 1(4) (1965)); Cal. Evid. Code § 115 (West 1966). The authorities Greenwich cites do not address whether Section 23(a)'s "rules of evidence" include rules allocating the burdens of production and persuasion. See also AIA Br. 23-24. In any event, as we have shown above (page 16, *supra*; see also Gov't Br. 45-47), express statutory language is not necessary to create an exception to Section 7(c)'s "burden of proof" requirement.

CONCLUSION

The judgments of the court of appeals in *Maher Terminals* and *Greenwich Collieries* should be reversed, and the cases should be remanded for further proceedings.

Respectfully submitted.

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